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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-196165

DATE: July 20, 1981

MATTER OF: Bell & Howell Corporation

**DIGEST:**

1. Allegation that proposal evaluation was not in accordance with stated criteria is without merit where record shows that deficiencies found in protester's proposal were reasonably related to stated evaluation factors and RFP requirements. Moreover, with respect to at least two such deficiencies, protester was clearly on notice as result of negotiation process that these were areas of concern.
2. Allegation that agency failed to consider cost in proposal evaluation under RFP which made cost secondary to technical considerations is without merit where agency report contains documentation of price analysis, cost evaluation and overall point scores received by each offeror. Record shows that awardee's proposal was scored highest overall even though protester received more points for cost due to its lower proposed cost plus fixed fee.
3. Allegation that proposals should have been considered essentially equal technically thus making lowest cost determinative award factor is without merit where agency found that proposal rated 3.6 points higher technically was significantly superior to protester's lower cost proposal. Whether point spread between two competing proposals indicates significant superiority of one proposal over another depends on facts

[Protest of Army Contract Award]

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and circumstances of each case and is primarily matter within discretion of procuring agency.

4. Alleged agency failure to provide proper justification for rejection of proposal as required by Defense Acquisition Regulation section 3-508.3(a)(v) provides no basis upon which to sustain protest since such postaward notification requirements are merely procedural in nature.
5. Allegations first raised in protester's comments on agency report are untimely under section 20.2(b)(2) of Bid Protest Procedures since not filed within 10 working days after bases of protest were known or should have been known. Failure to request additional statement in support of initial protest under section 20.2(d) of Procedures provides no basis on which protester can later raise new issues without regard to timeliness requirements.
6. General Accounting Office has no authority under Freedom of Information Act to determine what information must be disclosed by Government agencies. However, information in agency report which agency believes is exempt from disclosure will be considered in deciding protest and agency report on instant protest in fact provides sufficient documentation to support decision selection made by agency.
7. Claim for proposal preparation costs is denied where there is no showing that Government acted arbitrarily or capriciously with respect to protester's proposal.

Bell & Howell, Corporation protests the award of a contract to IntOp Division, Kollmorgen Corporation, by the Department of the Army under request for proposals (RFP) No. DAAK-40-79-R-0075. The contract was awarded on a cost-plus-fixed-fee basis.

The purpose of the contract effort is to establish a commercial manufacturing base for the production of high energy laser and infrared optics and optical support systems. The project is structured as a 10-month basic effort with two 1-year options. The basic effort includes the specification of a precision contouring diamond-turning machine, design of the metrology to measure surfaces made by the machine, and design of a facility to house the machine and metrological support.

As its basis for protest, Bell & Howell contends that the evaluation of its proposal and the award to Kollmorgen were not consistent with the evaluation criteria set forth in the RFP. Bell & Howell also alleges that it was not provided with any justification for the rejection of its proposal as required by Defense Acquisition Regulation (DAR) § 3-508.3(a)(v)(1976 ed.), and claims recovery of its proposal preparation costs.

#### 1. EVALUATION

The RFP contained the following "Evaluation Criteria and Award Factors":

"D-1. The criteria for evaluation of proposals \* \* \* shall be the adequacy with which the offeror has responded to each area of consideration enumerated below and the extent to which his proposed effort satisfies the requirements of the TR [technical requirements].

\* \* \* \* \*

#### "2. Specific Areas:

##### 1. Technical

a. Adequacy of the proposed approach to establish production techniques to include utilization of personnel and proposed organizational structures.

- b. Understanding of the TR with consideration for innovations/creativity as demonstrated in the proposal.
- c. Program plan for implementing methodology.
- d. Projection for engineering demonstration."

The evaluation criteria also emphasized that foremost consideration would be given to technical factors, with cost being of secondary importance. "Related Experience and Facilities" was listed as a third area of evaluation, and carried less weight than cost.

During a debriefing held after contract award, Bell & Howell was advised that the Army had identified six specific deficiencies in its proposal. These deficiencies, as reflected in the "Summary of Debriefing" prepared by the Army, are as follows:

"a. Corporate commitment to facility expansion is conditional upon receipt of contract award.

"b. Past utilization of Bell and Howell's capability has been discouraging and was considered insufficient to continue in-house R&D support or development. \* \* \* The overall cause of slow response, in the judgment of the technical committee, lies in a sluggishness on the part of Bell and Howell to aggressively market their capability.

"c. No information was provided as to type of machine to be procured.

"d. The goals cited in Para 3.3.2 of the Scope of Work contain levels of precision \* \* \* that \* \* \* might be very difficult to achieve or measure. \* \* \* The committee members \* \* \* felt concern as to whether Bell and Howell understood

the significance of the numbers or could really achieve them with the current 3-axis machine.

"e. [T]he technical committee expressed concern over questionable practice concerning metrology and the relationship between machine and part error \* \* \*. The method described is not straight-forward \* \* \* and leaves Bell and Howell having to repeat this measurement for every part, tying up valuable machine time.

"f. This also leaves Bell and Howell with no capability to make steep aspheres \* \* \*."

While Bell & Howell contends that each of these deficiencies is unrelated to the evaluation criteria in the RFP, the Army disagrees. In this regard, the Army asserts that the first and second listed weaknesses relate to the first technical evaluation criterion, "Adequacy of proposed approach to establish production techniques \* \* \*."

Essentially, the first two deficiencies concern Bell & Howell's commitment to developing and marketing the required technology. Bell & Howell asserts, however, that "corporate commitment" is a vague and nontechnical criterion not included within the stated evaluation factors.

Although agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify the various aspects of each which might be taken into account, provided that such aspects are reasonably related to or encompassed by the stated criteria. Buffalo Organization for Social and Technological Innovation, B-196279, February 7, 1980, 80-1 CPD 107.

Here, while the RFP did not specifically indicate that corporate commitment would be taken into account, the purpose of the effort as stated in the TR was to establish a commercial manufacturing base for the

production of high energy laser optics. The evaluation and award criteria section, supra, specifically provided that the extent to which an offeror's proposed effort satisfied the requirements of the TR would be considered. Thus, we believe that the Army could properly evaluate the extent to which Bell & Howell's proposal would satisfy the purpose of establishing a commercial manufacturing base, and that corporate commitment was a reasonably related consideration.

More importantly, the record shows that Bell & Howell was clearly on notice that corporate commitment was an area of concern. The Army requested clarifications from Bell & Howell after receipt of its initial proposal and specifically asked it to provide "supporting data to demonstrate Bell & Howell's commitment to support this effort \* \* \*." Bell & Howell responded to this question (although not to the Army's satisfaction) and, we note, expressed no concern that the complained of consideration was not encompassed by the RFP requirements. Under these circumstances we believe Bell & Howell was sufficiently informed that corporate commitment would be a consideration in proposal evaluation. See Buffalo Organization for Social and Technological Innovation, Inc., supra; The Ohio State University Research Foundation, B-190530, January 11, 1979, 79-1 CPD 15.

The third deficiency found by the Army in Bell & Howell's proposal was "no information provided as to type of machine to be procured." This relates to the fact that while in its initial proposal Bell & Howell offered to modify an existing machine, and described the machine in detail, it indicated in its best and final offer that the existing machine was no longer available but that it would purchase a new machine instead. No information concerning the type machine it would purchase was provided.

While the agency didn't specifically relate this deficiency to any particular criterion, we think it is clear that an offeror, in its proposal, is obligated to provide some detail with respect to each aspects of its proposed performance. Certainly Bell & Howell's decision to purchase a machine impacts on both the adequacy of its

proposed approach and its understanding of the requirements, and we believe the agency properly could consider the absence of any explanation or detailed information from Bell & Howell regarding this decision in conducting the overall evaluation of proposals.

With regard to the fourth, fifth and sixth weaknesses in Bell & Howell's proposal, the Army states that these were perceived as deficiencies under the technical evaluation criterion "Program plan for implementing methodology." The stated deficiencies relate to Bell & Howell's understanding of and probable ability to achieve the levels of precision specified in the RFP, and to its proposed methodology. We believe that these deficiencies were within the purview of the stated evaluation criterion, and in light of the RFP requirements, we find nothing improper in the Army's consideration of these matters.

Bell & Howell, in the course of arguing that the evaluation was not consistent with the stated criteria, has expressed disagreement with the agency as to the validity of the noted deficiencies. However, Bell & Howell has not demonstrated that the technical evaluation was without a reasonable basis, and we need only point out that a protester's disagreement with the evaluation can not alone demonstrate that the evaluation has no reasonable basis. K-MCC Inc. Consultants, B-190358, March 10, 1978, 78-1 CPD 194.

Bell & Howell also alleges that the Army applied different criteria to it than to Kollmorgen. Bell & Howell contends that underutilization of equipment, noted in the second deficiency found in its own proposal, could not be applied to Kollmorgen which is a newcomer to the field with no production capability. Assuming that the Army was in fact unable to take equipment utilization level into account when evaluating Kollmorgen's proposal, we do not find this dispositive. Rather, as noted above, the real concern reflected in the second deficiency found in Bell & Howell's proposal related to corporate commitment. It is clear from the record that corporate commitment was also considered in the evaluation of Kollmorgen's proposal. For example, after its initial evaluation of

proposals the technical evaluation committee found that "Kollmorgen appears to have the best overall proposal by combining the technical skills and experience, the corporate commitment, and the corporate strengths and optical knowhow directly oriented against the potential future market for machined optics. \* \* \*"

Bell & Howell further asserts that cost was not given appropriate consideration in the award of the contract. In this regard Bell & Howell alternatively argues that the Army disregarded cost consideration completely and that the slight difference in technical scores (3.6 points) dictates that the proposals be considered essentially equal, making cost the determinative award factor. Bell & Howell was the low offeror with a proposed cost approximately 18 percent below that of Kollmorgen, the second low offeror.

The Army did not ignore cost as a factor in proposal evaluation. The Army's report to this Office contains documentation of the price analysis, cost evaluation, and overall point scores (technical plus cost plus experience and facilities) received by each offeror. It also shows that Kollmorgen's proposal was scored higher overall than Bell & Howell's even though Bell & Howell received more points for cost due in its lower proposed cost.

Bell & Howell's argument that the proposals should have been considered technically equal, making cost determinative, is based on its analysis of our decisions which have held that even when the RFP assigns greater weight to technical factors, cost may nonetheless become the determinative factor if the proposals are found to be essentially equal technically. Applied Financial Analysis, Ltd., B-194388.2, August 10, 1979, 79-2 CPD 113; William Brill Associates, Inc., B-190967, August 7, 1978, 78-2 CPD 95; Computer Data Systems, Inc., B-187892, August 2, 1977, 77-2 CPD 67.

The underscored word "if" is key here since the Army did not consider Bell & Howell's and Kollmorgen's proposals technically equal. The dispositive element in a case such as this is not the technical scores per se but the considered judgment of the procuring agency concerning the significance of that difference. 52 Comp. Gen. 358 (1972).



Bell & Howell points out that the difference in the technical scores which were considered essentially equal in Applied Financial Analysis, Ltd., supra, was greater than that in this case. Nevertheless, whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends on the facts and circumstances of each case and is primarily a matter within the discretion of the procuring agency. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. Thus, we have upheld an award to a higher cost proposal judged technically superior by the contracting agency despite a technical point score spread of only 3 points. 52 Comp. Gen. 358, supra. Also see Bellmore Johnson Tool Company, B-179030, January 24, 1974, 74-1 CPD 26, where the higher cost proposal which was found to be technically superior was rated 4 points higher than the low cost offeror.

Here, the technical superiority of Kollmorgen's proposal was consistently recognized by the Army. Further, it is clear that the Army found that the cost difference involved was justified by this technical superiority. For example, after final evaluation of proposals the evaluation panel found that Kollmorgen was the best all around choice to become the Army's "industrial partner," and that Kollmorgen's proposed approach was sound, thorough and presented the lowest risk and highest potential for success. The panel unanimously selected Kollmorgen as the top choice for the effort. In contrast, the committee found that while Bell & Howell had improved its proposal in some respects, doubts concerning "the depth of approach" remained.

Accordingly, the record does not support Bell & Howell's contention that the proposals were judged to be essentially equal technically. In addition, it is clear that Kollmorgen's proposal was considered most advantageous to the Government despite its higher cost. Consequently, we reject Bell & Howell's argument that it should have received the award based on its lower cost.

## 2. JUSTIFICATION FOR REJECTION

Bell & Howell also argues that it was not provided with a proper justification for the rejection of its proposal as required by DAR § 3-508.3(a)(v). This

section actually requires, in part, that the contracting officer provide unsuccessful offerors with information in general terms concerning why their proposals were not accepted.

The Army states that it considers the notification letter it sent to Bell & Howell regarding the rejection of its proposal adequate to comply with the DAR requirements. The letter stated that after careful evaluation of all elements of the proposals, it was determined that Kollmorgen's proposal was most advantageous to the Government.

While we agree with Bell & Howell that the letter provided little substantive information concerning the reasons for the rejection of its proposal, we need not consider whether this amounted to a violation of DAR § 3-508.3(a)(v) since such a finding would provide no basis upon which to sustain the protest. As we have frequently stated, post-award notification requirements such as those contained in DAR § 3-805.3 are procedural in nature and failure to comply with them provides no legal basis for disturbing an otherwise valid award. Century Brass Products, Inc., B-190313, April 17, 1978, 78-1 CPD 291; Wakmann Watch Company, Inc., B-187335, January 28, 1977, 77-1 CPD 72.

### 3. SUBSIDIARY ISSUES

Bell & Howell raised a number of subsidiary issues in its comments on the agency report which it submitted more than 2 months after it filed its original protest with this Office and nearly 2 months after the debriefing. These include allegations that the sequence of procurement steps was "aberrational," that the Army's actual motives for entering into this procurement were improper, and that the discussions held with Bell & Howell were not meaningful. We believe that all of these issues are untimely since it is clear that Bell & Howell knew of these bases of protest no later than the time the debriefing was held, yet it failed to file its protest within 10 working days from that date as required by our Bid Protest Procedures. 4 C.F.R. § 20.2(b)(2) (1980).

In this regard, we note that Bell & Howell states that it was told by the attorney handling this case that no supplemental statement in support of its original protest was required under section 20.2(d) of our Procedures. The cited

section references the possibility that this Office may require the filing of an additional statement in support of an initial protest. However, the fact that no such statement was required certainly does not provide any basis upon which a protester can later raise new issues without regard to the established timeliness requirements.

Finally, Bell & Howell has repeatedly emphasized that its attempts to obtain information concerning the evaluation and rejection of its proposal have been thwarted by the Army's delay in processing and its eventual denial of Bell & Howell's Freedom of Information Act (FOIA) request. Bell & Howell asserts that since the Army has refused to provide it with any documentation in support of its selection decisions, such documentation may be nonexistent.

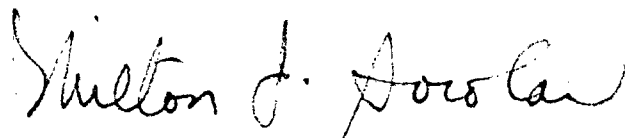
Our Office has no authority under FOIA to determine what information must be disclosed by Government agencies. While information in an agency report which the agency believes is exempt from disclosure under FOIA will be considered by our Office in reaching a decision on the merits of the protest, we will not disclose it outside the Government. The protester's recourse in such situations is to pursue its disclosure remedy under the procedures provided by FOIA. INTASA, B-191877, November 15, 1978, 78-2 CPD 347.

In this case, the agency report in fact contains sufficient documentation to support the selection decision made by the Army. We have carefully reviewed and considered it in light of the allegations raised by Bell & Howell, and have concluded that the record on the whole does not support these allegations.

The protest is denied.

#### 4. BID AND PROPOSAL COSTS

Bell & Howell has requested reimbursement for the costs of preparing its proposal. However, such costs can only be recovered if the Government has acted arbitrarily or capriciously with respect to the proposal. See Spacesaver Systems, Inc., B-197174, August 25, 1980, 80-2 CPD 146. In view of our conclusions above, the claim is denied.



Acting Comptroller General  
of the United States